SUPREME COURT, U. S.

FILED

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MICHAEL RODAK, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-994

SCHOOL COMMITTEE OF SPRINGFIELD,
PETITIONER,

v.

BOARD OF EDUCATION et al.,
RESPONDENTS.

BRIEF OF RESPONDENTS BOARD OF EDUCATION ET AL. IN OPPOSITION TO CERTIORARI

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Blanchard Press, Inc., Boston, Mass. — Law Printers

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	3
Questions Presented	3
Constitutional and Statutory Provisions Involved	3
Statement of the Case	4
Argument	
I. Because the Petition for Certiorari Was Not Filed Within Ninety Days After Entry of the Supreme Judicial Court Order, There Is No Jurisdiction To Entertain the Petition.	7
II. Review Should Be Denied Because the Judgment Below Rests on Adequate Non-Federal Grounds.	9
III. Review Should Be Denied Because the Judgment Below Was Correct and in Accord With the Decisions of This Court.	10
Conclusion	14

Table of Citations

Cases

Barksdale v. *Springfield School Committee*, 237 F.Supp. 543 (D. Mass. 1965) *rev'd, School Committee of Springfield* v. *Barksdale*, 348 F.2d 261 (1st Cir. 1965)	10
Bradley v. *Milliken*, 433 F.2d 897 (6th Cir. 1970), *rev'd*, 418 U.S. 717 (1974)	13
Brinkman v. *Gilligan*, (S.D. Ohio #72-137, Feb. 7, 1973), *aff'd*, 503 F.2d 684 (7th Cir. 1974)	13
Cole v. *Violette*, 319 U.S. 581 (1943)	8
Commissioner of Education v. *School Committee of*	

Page

Leyden, 358 Mass. 776, *cert. den.* 404 U.S. 849 (1971) 9
Cox Broadcasting Co. v. *Cohn*, 43 U.S.L.W. 4343 (March 3, 1975) 8, 10
Dept. of Banking v. *Pink*, 317 U.S. 264 (1942) 8
Dept. of Mental Health v. *Kirchner*, 380 U.S. 194 (1965) 9
Dixon v. *Duffy*, 342 U.S. 33 (1951) 7, 9
Fox Film Corp. v. *Muller*, 296 U.S. 207 (1935) 9
Herb v. *Pitcairn*, 324 U.S. 117 (1945) 10
Jankovich v. *Indiana Toll Road Comm'n*, 379 U.S. 487 (1965) 9
Keyes v. *School Dist. No. 1, Denver, Colo.*, 303 F. Supp. 289 (D. Colo. 1969) 13
Keyes v. *School Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973) 12
Lee v. *Nyquist*, 318 F. Supp. 710 (W.D. N.Y. 1970), *aff'd* 402 U.S. 935 (1971) 12, 13
Market Street R. Co. v. *R. R. Comm'n*, 324 U.S. 548 (1945) 8
Martin v. *Evansville-Vandenburg Sch. Corp. of Evansville*, 347 F. Supp. 816 (S.D. Ind. 1972) 13
Murdock v. *City of Memphis*, 20 Wall. 590 (1875) 9
NAACP v. *Lansing Bd. of Ed.*, 485 F.2d 569 (6th Cir. 1973) .....
Offerman v. *Nitkowski*, 248 F. Supp. 129 (W.D.N.Y. 1965), *aff'd*, 378 F.2d 22 (2d Cir. 1967) 12
Oliver v. *Kalamazoo Bd. of Ed.*, 346 F. Supp. 766 (W.D. Mich. 1972), *aff'd, sub nom. Oliver* v. *School Dist. of Kalamazoo*, 448 F.2d 635 (6th Cir. 1971) 13
Opinion of the Justices, Mass. Adv. Sh. (1973) 1027, 298 N.E. 2d 840 10
Poe v. *Ullman*, 367 U.S. 497 (1961) 10
Puget Sound Power Co. v. *King Co.*, 264 U.S. 22 (1924) 8
Reitman v. *Mulkey*, 387 U.S. 369 (1967) 13

Page

Rescue Army v. *Municipal Court of Los Angeles*, 331 U.S. 549 (1947) 10

School Committee of Boston v. *Board of Education*, 352 Mass. 693 (1967), *app. dismissed*, 389 U.S. 572 (1968) 12

School Committee of Springfield v. *Board of Education* (*Springfield I*), Mass. Adv. Sh. (1972) 1543, 287 N.E. 2d 438 ..... 2, 4

School Committee of Springfield v. *Board of Education* (*Springfield II*), Mass. Adv. Sh. (1974) 657, 311 N.E. 2d 69 ..... 2, 5, 7

School Committee of Springfield v. *Board of Education* (*Springfield III*), Mass. Adv. Sh. (1974) 2031, 319 N.E.2d 427 2

Scofield v. *NLRB*, 394 U.S. 427 (1969) 7

State Tax Comm'n v. *Van Cott*, 306 U.S. 511 (1939) .. 9

Swann v. *Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971) 12

Universal Adjustment Corp. v. *Midland Bank, Ltd.*, 281 Mass. 303 (1933) 10

Constitutional Provisions

United States Constitution, Fourteenth Amendment .. 9

Massachusetts Constitution, Declaration of Rights,

Article I 9, 10

Article X 9, 10

Federal Statutes

28 U.S.C. § 1257 ..... 3, 8

§ 2101(c) 3, 7, 8

Massachusetts Statutes

	Page
General Laws,	
Chapter 15, § 1G	2
§ 1I	1, 4
§ 1J	1, 3, 4
§ 1K	1, 3
Chapter 71, § 37C	1, 3, 4
§ 37D	1, 3, 4
Chapter 211, § 8	4, 9
§ 9	4, 9
Statutes 1974, Chapter 636	4, 6, 14

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BRIEF OF RESPONDENTS BOARD OF EDUCATION ET AL. IN OPPOSITION TO CERTIORARI

Respondents Massachusetts Board of Education and Commissioner of Education (hereinafter collectively called "Board") file this brief in opposition to the Petition for Certiorari. Under the provisions of the Massachusetts Racial Imbalance Law prior to its amendment in July, 1974, the Board was specifically charged with requiring local school committees to eliminate racial imbalance in public schools. Mass. Gen. Laws, ch. 15, § 1 I-K; ch. 71, § 37 C-D. The Board is also charged with requiring school

committees to comply with laws pertaining to public education. Mass. Gen. Laws, ch. 15, § 1G. The Springfield School Committee, Petitioner herein, was ordered by the Board to implement a plan that would eliminate racial imbalance in the Springfield public schools. This Board order was affirmed and ordered enforced by a decree of the Supreme Judicial Court of Massachusetts. The petition for certiorari is taken from the action of the Supreme Judicial Court denying petitioner's motion to vacate that decree. The Respondent Intervenor below has also filed a brief in opposition to the petition.

Opinions Below

The opinion of the Supreme Judicial Court at issue here is *School Committee of Springfield* v. *Board of Education, (Springfield III)* Mass. Adv. Sh. (1974) 2031, 319 N.E.2d 427, and is contained in Petitioner's Appendix. That opinion was the last of a long series of court and administrative decisions described below.

After the *Springfield I* decision of the Supreme Judicial Court, Mass. Adv. Sh. (1972) 1543, 287 N.E. 2d 438, the Board on October 12, 1973 issued an administrative order requiring Petitioner to implement a racial balance plan (Pet. App. p. 6).

In the *Springfield II* decision the Court affirmed and ordered enforced this administrative order. Mass. Adv. Sh. (1974) 657, 311 N.E. 2d 69. Following an amendment of the Racial Imbalance Law, Petitioner moved to vacate the decree entered in *Springfield II*. On August 13, 1974 the Board issued an opinion and order opposing the motion to vacate. Pet. App. p. 11 n. 14. The Supreme Judicial Court denied the motion to vacate for the reasons stated in the *Springfield III* opinion.

Jurisdiction

As stated in section I of the Argument, the petition for certiorari was not filed within ninety days of the judgment or decree of the Supreme Judicial Court, which was entered on August 22, 1974, and so does not meet the requirements of 28 U.S.C. § 2101 (c).

Questions Presented

1. Whether the filing of the petition for certiorari was timely.
2. Whether review should be granted where the state court decision is adequately and expressly based on state constitutional grounds as well as federal constitutional grounds.
3. Whether the state court erred in holding that actions taken by a school committee to reinstitute segregation that had been virtually eliminated in schools violated the Fourteenth Amendment to the United States Constitution.

Constitutional and Statutory Provisions Involved

The federal law provisions involved are the Fourteenth Amendment to the United States Constitution and 28 U.S.C. §§ 1257 and 2101 (c).

The state constitutional provisions are Articles I and X of the Declaration of Rights of the Massachusetts Constitution. (Respondent Intervenor's Appendix F, pp. 19-20).

The state statutory provisions involved are:

(1) The Massachusetts Racial Imbalance Law prior to amendment of July 26, 1974, which appears at Mass. Gen. Laws ch. 15, §§ II, 1J, 1K; ch. 71, §§ 37C and 37D; and

ch. 76, § 12A, all set forth in Pet. App. pp. 58-64, except for ch. 15, § 1K, not relevant here;

(2) The July 26, 1974 amendment to the Racial Imbalance Law, Mass. St. 1974, ch. 636, set forth in Pet. App. pp. 44-58;

(3) Mass. Gen. Laws ch. 211, §§ 8 and 9, set forth in Respondent Intervenor's App. F, p. 20.

Statement of the Case

In 1965 Massachusetts promulgated a Racial Imbalance Law designed both to promote racial balance and to eliminate racial imbalance in its public schools. Under that law, local school committees were required to conduct an annual racial census, and if the census showed the existence of imbalanced schools (greater than 50% nonwhite), to file with the Board plans to eliminate the imbalance. (Mass. Gen. Laws ch. 71, § 37D, Pet. App. pp. 61-63). The Board, in turn, was given supervisory and enforcement powers, including the power to require implementation of plans that revised internal district boundaries and required transportation of students. (Mass. Gen. Laws ch. 15, §§ 1I-1J, § 37C, Pet. App. pp. 58-63).

The first racial census in 1965 showed Springfield to have six racially imbalanced elementary schools. Of these, one was closed and five remained continuously imbalanced and, indeed, worsened from 1965 to June of 1974 (Pet. App. p. 4).

From 1965 to 1972 there were a series of agreements, administrative actions, and adversary court proceedings as the Board attempted to secure compliance from Petitioner with the Racial Imbalance Law (Pet. App. pp. 4-5). In *School Committee of Springfield* v. *Board of Education* (*Springfield I*), Mass. Adv. Sh. (1972) 1543, 287 N.E. 2d 438, the Supreme Judicial Court disapproved of an ad-

ministrative action taken by the Board but ordered Petitioner to adopt and implement a plan to racially balance all Springfield schools by September of 1973. In November of 1972 Petitioner represented to a court and to the Board that the school committee would file such a plan with the Board by early 1973. Petitioner neither adopted nor put into effect any such plan (Pet. App. pp. 5-6).

When no plan had been filed by June of 1973 the Board obtained a court order requiring Petitioner to file such a plan immediately. A four-page "plan" to balance two grades was filed and the Board commenced administrative proceedings. (Pet. App. pp. 5-6). A citizen's group, the Quality Integrated Education Committee, intervened in the administrative proceedings, was a party in proceedings before the Supreme Judicial Court, and has filed a brief in opposition to certiorari (hereinafter "Respondent Intervenor").

As a result of these proceedings the Board on October 12, 1973 issued an "Opinion and Order" directing Petitioner to implement a plan prepared by the Springfield School Department ("Task Force Plan".) Petitioners sought judicial review of the Order and the Board counterclaimed for enforcement. While review was pending, the Board obtained a series of court orders requiring Petitioner to submit and comply with a schedule for implementing the plan. (Pet. App. pp. 6-7). On May 1, 1974 the Supreme Judicial Court in the *Springfield II* decision, Mass. Adv. Sh. (1974) 657, 311 N.E. 2d 69, rejected all of Petitioner's claims, affirmed the Board order, and granted the Board's counterclaim for enforcement. Although a single Justice of the Supreme Judicial Court retained jurisdiction to ensure implementation, Petitioner complied with Board orders to implement the Plan. By the time of the subsequent proceedings before the Supreme Judicial Court, virtually every step needed for implementation had

been taken, including change in district lines, completion and notification of pupil and teacher assignments, completion of a transportation and safety plan, ordering of additional vehicles, and the conducting of community education programs. "Springfield had in fact achieved a racially balanced school system." (Pet. App. pp. 14-15).

On July 26, 1974 an amendment to the Racial Imbalance Law was enacted, which, among other changes, deprived the Board of the power to order redistricting or transportation as part of a racial balance plan. Mass. St. 1974, ch. 636, § 1 (Pet. App. pp. 44-47; Pet. App. p. 10). On August 1, 1974, a majority of Petitioner school committee voted (1) to direct its staff to cease implementing the plan without further approval, and (2) to reopen the schools in September 1974 with the same grade structure and organization as the prior year. (Pet. App. p. 10). These votes were inconsistent with Board and Court orders. (Pet. App. p. 6 n. 8).

On August 2, 1974, the petitioner filed a motion with the Supreme Judicial Court that it vacate its prior final decree. (Pet. App. pp. 10-11). The Board filed an administrative "Opinion and Order" with the Court on August 13, 1975, opposing the motion to vacate. The Attorney General's Office, despite the expressed position of the Board, supported the motion to vacate while appearing in the name of the Board before the Court. (Pet. App. p. 11 n. 14). The Respondent Intervenor opposed the motion to vacate.

After oral argument, the Supreme Judicial Court entered an order on August 22, 1974, denying the motion to vacate (Pet. App. p. 11; Res. Int. App. C, p. 16). The Court's opinion was issued November 12, 1974. That same day a rescript was entered that did not itself contain an order but simply referred to the order of August 22, 1974. (Res. Int. App. D, p. 17).

Argument

I. Because the Petition for Certiorari Was Not Filed Within Ninety Days After Entry of the Supreme Judicial Court Order, There Is No Jurisdiction to Entertain the Petition.

The petition for certiorari seeks review of the action by the Supreme Judicial Court of Massachusetts denying petitioner's motion to vacate a final decree entered earlier by that Court in *School Committee of Springfield* v. *Board of Education,* Mass. Adv. Sh. (1974) 657, 311 N.E. 2d 69. (Res. Int. App. A). On August 22, 1974, the Supreme Judicial Court entered an order denying the motion to vacate. (Res. Int. App. C). No further orders or judgments were entered after entry of the August 22, 1974 order. On November 12, 1974, that Court issued an opinion explaining the reasons for the August 22, 1974 order (Pet. App.), and subsequently issued a rescript. (Res. Int. App. D).

The time period under 28 U.S.C. § 2101 (c) for filing a petition for certiorari in this case expired on November 20, 1974, ninety days after the August 22, 1974 order. The petition for certiorari was actually filed on February 10, 1975. The ninety day time period for filing the petition for certiorari ran from the date of the entry of the state court's decree or order, on August 22, 1974, not from the state court's opinion.[1] *Scofield* v. *NLRB,* 394 U.S. 423, 427

[1] No particular hardships were imposed on petitioner's rights of review by the fact that the ninety day period expired eight days after the issuance of the Supreme Judicial Court's opinion. Anticipating an opinion, Petitioner might easily have applied for an extension of time to file a petition for certiorari, Sup. Ct. Rule 22 (1), or filed a petition stating probable grounds for review and sought leave to amend later. Had no opinion been issued, it would have been free to seek review within the proper time limits. *Dixon* v. *Duffy,* 342 U.S. 33 (1951).

(1969); *Puget Sound Power Co.* v. *King Co.*, 264 U.S. 22, 23-25 (1924).

This Court's jurisdiction under 28 U.S.C. § 1257 is to review final judgments or decrees of state courts not opinions. 28 U.S.C. § 2101 (c) restricts this Court's jurisdiction over state civil cases to those in which review is sought within ninety days of the entry of a reviewable judgment. *Cox Broadcasting Co.* v. *Cohen*, 43 U.S.L.W. 4343, 4356 (U.S. March 3, 1975) (Rehnquist, J., dissenting).

It was the August 22, 1974 order that "in fact fully adjudicated rights and . . . [was] not subject to further review by [the] state court," and so constituted the "judgment or decree" pursuant to 28 U.S.C. § 1257. *Dept. of Banking* v. *Pink*, 317 U.S. 264, 268 (1942); see also *Market Street R. Co.* v. *R.R. Comm'n.*, 324 U.S. 548, 551-552 (1945). The Springfield public schools opened in September under the Racial Balance plan that had been approved by the Supreme Judicial Court in the Spring of 1974, thus complying with the August 22 order denying the motion to vacate (Pet. App. p. 2 n. 3). The Supreme Judicial Court itself considered the August 22, 1974 order to be the final decree in the case: the subsequent opinion merely stated the reasons underlying that order and contained no order or judgment (Pet. App. pp. 2, 11). This is consonant with the distinction in Massachusetts law between orders or judgments and opinions.[2] Mass. Gen. Laws,

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[2] It is a peculiarity of Massachusetts procedure that for state law purposes, the final decree is usually the decree entered after rescript from the full Supreme Judicial Court to the lower court. In the instant case, the final decree is not in the rescript, which contains no order or judgment (Res. Int. App. D), but in the August 22, 1974 order. *Cole* v. *Violette*, 319 U.S. 581 (1943), holds that the time period in 28 U.S.C. §2101 (c) starts to run from the order by the Supreme Judicial Court directing a lower court to enter the final decree. Under the *Cole* rule, this Court has specifically adopted a test for Massachusetts cases of the 28 U.S.C. §1257 "judgment or decree" being the earliest order entered by the Supreme Judicial

ch. 211, §§ 8 and 9 (Res. Int. App. F). Because the filing of this petition for certiorari was not timely, it should be denied.

II. Review Should Be Denied Because the Judgment Below Rests on Adequate Non-Federal Grounds.

The majority opinion of the Supreme Judicial Court based its denial of petitioner's motion to vacate on Articles I and X of the Declaration of Rights of the Massachusetts Constitution and alternatively on the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (Pet. App. pp. 14 and 15). The concurring opinion was based on entirely state grounds (Pet. App. pp. 23-28), and there was no dissenting opinions.

This Court should not assume jurisdiction because the Massachusetts law grounds are adequate to support the judgment, are independent of federal law, and are clearly tenable. *Fox Film Corp.* v. *Muller,* 296 U.S. 207 (1935); *Murdock* v. *City of Memphis,* 20 Wall. 590 (1875). Where the judgment rests alternatively on state and federal constitutional provisions, this court will deny review. *Jankovich* v. *Indiana Toll Road Comsn, Ind.,* 379 U.S. 487 (1965). As in *Jankovich,* and unlike *Dept. of Mental Health* v. *Kirchner,* 380 U.S. 194 (1965), the state court here expressly and without ambiguity relied on state constitutional grounds. Further, its holding as to the content of those state constitutional guarantees was not reached under the compulsion of federal law, see *State Tax Comm'n* v. *Van Cott,* 306 U.S. 511 (1939), but independently. The Supreme Judicial Court has held that the guarantees of

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Court that fully determines the rights of the parties. See also *Commissioner of Education* v. *School Committee of Leyden,* 358 Mass. 776, *cert. den.,* 404 U.S. 849 (1971). In the case at bar the earliest order, indeed the only order, was entered on August 22, 1974.

Articles I and X of the Massachusetts Constitution are *at least* as great as those in the equal protection clause. *Opinion of the Justices,* Mass. Adv. Sh. (1973) 1027, 1036, 298 N.E.2d 840, 846; *Universal Adjustment Corp.* v. *Midland Bank, Ltd.,* 281 Mass. 303, 320 (1933). State courts are free to interpret state statutes and constitutions more broadly than the federal counterparts. *Oregon* v. *Hass,* 43 U.S.L.W. 4417, 4418-19 (U.S. March 19, 1975). The state court's decree rests adequately on state law grounds and provides no basis for departure from this Court's well established rule against review. Further, in the circumstances of this case, this Court should not exercise its discretion to grant certiorari because in all probability its opinion would be advisory and a needless decision of a constitutional issue. *Herb* v. *Pitcairn,* 324 U.S. 117, 125-126 (1945); *Cox Broadcasting Co.* v. *Cohn,* supra (Rehnquist, J. dissenting); cf. *Poe* v. *Ullman,* 367 U.S. 497 (1961); *Rescue Army* v. *Municipal Court of Los Angeles,* 331 U.S. 549 (1947).

III. Review Should Be Denied Because the Decree Below Was Correct and in Accord With the Decisions of This Court.

The decision below is clearly correct under this Court's rulings. Petitioner's actions to reinstitute a segregated school system were properly held unconstitutional.

Petitioner's two basic arguments misconceive and misstate the holding of the Supreme Judicial Court. First, Petitioner argues that because it had not, prior to August 22, 1974, been adjudicated guilty of *de jure* segregation in its public schools,[3] there could be no violation of

[3] Petitioner's practices were the subject of challenge in *Barksdale* v. *School Committee of Springfield,* 237 F. Supp. 543 (D. Mass. 1965), where plaintiffs successfully argued that segregation caused

the Fourteenth Amendment in granting its motion to vacate and allowing it to reinstitute its previous structure of segregated schools (Pet. pp. 9-12). Secondly, Petitioner argues that the Supreme Judicial Court impermissibly "locked [the Massachusetts legislature] into its initial structure [for the Racial Imbalance Law] and . . . forever prevented it from making any meaningful amendments" (Pet. p. 24). Neither argument has merit.

The Supreme Judicial Court decided that where, pursuant to a judicial decree, a school system had taken a number of steps and had "in fact achieved a racially balanced school system," a school committee's return to prior segregated schools legitimated by the court's rescission of its decree would be an unconstitutional act of *de jure* segregation (Pet. App. pp. 14-15). The state court found that "substantially every action which was necessary to the implementation of the Task Force plan was taken," and listed those actions (Pet. App. pp. 14-15). This, the Court found,

> . . . in effect created a new status quo in which every elementary school is racially balanced. If, now that that new status quo has been substantially achieved, either the school committee or the Legislature act so as to resurrect the pre-existing school structure, the resulting racial segregation in the five elementary schools would clearly be State imposed and thus unconstitutional. Events have simply moved too far to permit such a reversion.
> (Pet. App. pp. 22-23).

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deprivation of equal educational opportunity, without focussing on whether the segregation was *de facto* or *de jure*. The First Circuit Court of Appeals reversed, finding that the theory of recovery did not accurately reflect the law. *School Committee of Springfield* v. *Barksdale*, 348 F.2d 261 (1st Cir. 1965). No case has yet been brought against Petitioner on a *de jure* segregation theory, although the author of the concurring opinion in the Supreme Judicial Court calls Petitioner's policies "of dubious constitutionality." (Pet. App. p. 27).

Thus, the Court held that in the circumstances of this case, the reversion voted by Petitioner on August 1, 1974 and sought through the motion to vacate would constitute intentional, purposeful governmental action that would result in segregated schools. This is the very definition of unconstitutional, *de jure* segregation. *Keyes* v. *School Dist. No. 1, Denver Colo,* 413 U.S. 189, 208 (1973); (Pet. App. pp. 16-17 n. 21). Because the reversion would require the action of the school committee and the legislature there can be no question of state action. In this context it is simply irrelevant whether the original cause of the segregation was *de facto* or *de jure.* Also not pertinent is the statement from *Swann* v. *Charlotte-Mecklenburg Bd. of Ed.,* 402 U.S. 1, 24 (1971) relied on by Petitioner, that the Constitution does not require racial balance. A state's voluntary efforts to eliminate racial imbalance in its public schools are constitutional. *Swann,* supra, at 16; *School Committee of Boston* v. *Board of Education,* 352 Mass. 693 (1967), app. dismissed for want of subst. federal question, 389 U.S. 572 (1968); *Offermann* v. *Nitkowski,* 248 F. Supp. 129 (W.D.N.Y. 1965), aff'd, 378 F.2d 22 (2d Cir. 1967). See also *Lee* v. *Nyquist,* 318 F. Supp. 710 (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971). The Supreme Judicial Court did not find unconstitutional a failure to remedy *de facto* segregation, but rather found unconstitutional intentional governmental action designed to re-create a virtually eliminated condition of segregation in the schools.

As to Petitioner's second argument, the Supreme Judicial Court addressed itself to the unique circumstances of this case and did not, as claimed, lay down a broad restriction on the exercise of the legislative power to amend. The state court decided only the case before it, as it repeatedly notes (Opinion below, Pet. App. p. 14 "in the circumstances of this case," p. 15 "in these circumstances," p. 32, "in this setting," "at this stage.") Its decision was clearly correct and in accord with the rulings of this Court.

The decision of the Supreme Judicial Court on the federal constitutional issue was based primarily on two lines of cases. The first line of cases consistently holds that rescission of public school racial balance plans and attempts to return to the *status quo ante* constitute *de jure* segregation in violation of the Fourteenth Amendment, and in none of the cases was this holding reversed on appeal. *Keyes* v. *School District No. 1, Denver, Colo.*, 303 F. Supp. 289, 295 (D. Colo. 1969), aff'd and rev'd on other grounds, 413 U.S. 189, noted at 199 n. 10 (1971); *Bradley* v. *Milliken*, 433 F.2d 897, 904 (6th Cir. 1970), rev'd on other grounds but upheld on this issue, 418 U.S. 717, 738 n. 18 (1974); *Brinkman* v. *Gilligan*, (S.D. Ohio #72-137, Feb. 7, 1973), aff'd, 503 F.2d 684 (7th Cir. 1974); *Oliver* v. *Kalamazoo Bd. of Educ.*, 346 F. Supp. 766, 780 (W.D. Mich. 1970), aff'd, 448 F.2d 635 (6th Cir. 1971), 508 F.2d 178 (1974); *Martin* v. *Evansville-Vandenbergh Sch. Corp. of Evansville*, 347 F. Supp. 816, 820 (S.D. Ind. 1972). The case at bar is perhaps stronger than these precedents because the unconstitutional activity was not the mere rescission but rescission after the status of segregation had in fact essentially been eliminated.

The second line of cases relied on by the Supreme Judicial Court, stemming from *Reitman* v. *Mulkey*, 387 U.S. 369 (1967), provides direct support for its holding. See also *Lee* v. *Nyquist*, supra. In the context of the *Reitman* analysis of "historical context," "immediate objective," and "ultimate effect," the Supreme Judicial Court made the following findings:

> Similarly, in the present case, it is quite clear that the school committee, although not barred by c. 636, will not voluntarily order the redistricting and busing which is integral to the Task Force plan. And from the past efforts in Springfield it is equally clear that racial balance cannot be achieved without such redis-

tricting and busing. Thus, in this setting, by depriving the board of its power to require the use of effective measures for the elimination of racial imbalance, c. 636 is, in effect, 'an authorization to discriminate.' (Opinion below, Pet. App. p. 22).

Thus the Court specifically found that Chapter 636 did not, in this context, have a racially neutral effect and most certainly did not have a racially beneficial effect, as argued by Petitioner. (Pet. p. 18). The Court found that Petitioner's construction of Chapter 636 would constitute "State action serving to continue segregation in the schools and thus 'significantly . . . [involve] the State' in . . . racial discrimination." (Pet. App. p. 22).

Conclusion

It is respectfully submitted that the petition for certiorari was not timely, that the judgment below was based on adequate and independent state grounds, and that granting of review would infringe important federal judicial policies. It is also submitted that Petitioner has failed to sustain its burden under Rule 19 of establishing that there are important reasons to grant review. This case presents no novel questions to this court. The judgment below was squarely in accord with the applicable decisions of this Court. Certiorari should therefore be denied.

Respectfully submitted,

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